BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN M. WRIGHT Claimant VS.	)	
	)	Docket No. 163,929
MONTGOMERY ELEVATOR CO. Respondent AND	)	
NATIONAL UNION FIRE INSURANCE CO. Insurance Carrier AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Both the claimant and respondent appeal requesting Appeals Board review of an Award entered by Special Administrative Law Judge William F. Morrissey on June 7, 1994.

APPEARANCES

Claimant appeared by his attorney, James P. Johnston of Wichita, Kansas. Respondent and insurance carrier appeared by their attorney, Edward D. Heath, Jr., of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Andrew E. Busch of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations entered in the June 7, 1994 Award.

ISSUES

Claimant and respondent request Appeals Board review of the following issues:

(1) Whether claimant's accidental injury arose out of and in the course of his employment;
(2) Whether claimant gave timely notice of accident and if not, was respondent prejudiced;

(3) The average weekly wage of claimant on date of accident; and
(4) Nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record and hearing the arguments of the parties, the Appeals Board finds as follows:

(1) Claimant alleges that he suffered an injury to his back while performing his regular work activities for the respondent each and every working day from September 5, 1990 through February 12, 1992. Respondent admits that claimant sustained a work-related injury to his back on September 5, 1990, but specifically denies that claimant thereafter met with injury due to his regular work activities as alleged by the claimant. The Special Administrative Law Judge found that claimant sustained a back injury while working for respondent and the cause of his injury was his employment activities. However, he found the date of accident to be December of 1991 through February 12, 1992, instead of the dates of accident alleged by claimant or the date admitted by respondent.

Claimant first injured his back while working for the respondent, lifting heavy metal with another employer from a skid to the table of a shear on September 5, 1990. Claimant reported this accident and was sent, by the respondent, for medical treatment to a clinic in Arkansas City, Kansas. At that time, marijuana was found in the claimant's bloodstream. Before he received the prescribed conservative treatment for his back, he was placed in St. Joseph Hospital, Wichita, Kansas, in a drug treatment program. Following the drug treatment program, claimant worked as a lead man for the respondent which did not require him to perform physical labor. He testified that his back, at that time, was reasonably good. However, in December of 1991 claimant decided to change jobs from a lead man to operating a new computerized punch press which required him to do heavy lifting and constant twisting and turning. Subsequently, claimant's back began to worsen while operating this punch press. Claimant testified that he began to miss work because of his back problems and during the following months he obtained treatment on his own for this increased symptomatology from chiropractor, Dr. Wayne A. Brooks. Claimant was eventually terminated from respondent's employment on February 12, 1992 because of excessive absenteeism, which claimant attributes to his back problems.

Claimant's supervisor, Randall Clifford, testified that he knew claimant was having back problems in February of 1992 but did not know claimant was experiencing problems after claimant's accident on September 5, 1990 and continuing until February of 1992. Claimant testified that he told his supervisor and also told Dr. Brooks that his work activities were bothering his back. Dr. Brooks, however, testified that the claimant had not related to him that his back problems were work connected. Dr. Brooks did opine, after being given a description of claimant's work duties required to operate the punch press, that this type of work could definitely cause the symptoms that claimant was describing. Paul S. Stein, M.D., a neurosurgeon, who performed surgery on the claimant for his back problems, also expressed an opinion that the work that the claimant performed for the respondent probably exacerbated and was related to the thoracic disc herniation for which the claimant underwent surgery.

The Appeals Board affirms the finding of the Special Administrative Law Judge that the claimant injured his back while performing his regular work activities for the respondent from December of 1991 until his last day worked of February 12, 1992. Although the claimant did not announce to the respondent and his treating doctors that his work

activities were causing his back condition to worsen, the evidence presented through claimant's testimony and claimant's supervisor, Randall Clifford, established that in December of 1991 claimant commenced operating a punch press which was a much more physically demanding job and which then resulted in his back symptoms worsening.

(2) Respondent also has raised the issue of whether claimant gave notice to the respondent as required by K.S.A. 44-520 (Ensley) that he injured his back while working from December 1991 through February 12, 1992. Claimant's supervisor, Randall Clifford, testified that he knew claimant's back was bothering him in February of 1992 when claimant was terminated for excessive absenteeism. The Appeals Board concludes that the respondent received notice through claimant's supervisor of claimant's back injury in February 1992 which satisfies the timely notice requirements of K.S.A. 44-520. (Ensley)

(3) The Award contains the stipulation of the parties to the claimant's average weekly wage in the amount of $426.88 for an injury date of September 5, 1990. The Special Administrative Law Judge found that the claimant's injury date was from December 1991 to his last day worked of February 12, 1992 which the Appeals Board has affirmed. Accordingly, the Appeals Board likewise affirms the finding that the appropriate average weekly wage is $439.20. The Administrative Law Judge calculated the average weekly wage from a wage statement provided by the respondent contained in the evidentiary record.

(4) As noted above, claimant eventually received treatment from Paul S. Stein, M.D., a neurosurgeon in Wichita, Kansas, who diagnosed a disc protrusion at T-11,T-12. Dr. Stein performed a transpedicle discectomy on the left between T-11 and T-12 on June 9, 1992. Claimant's post-operative recovery was uneventful and Dr. Stein released the claimant, having reached maximum medical improvement, on October 6, 1992. He placed permanent restrictions on the claimant of no lifting over fifty (50) pounds; no bending or twisting back more than fifty percent (50%) of the time; no lifting or working overhead. Dr. Stein opined that claimant had a fifteen percent (15%) functional impairment to the whole body as a result of his back injury and subsequent surgery.

Claimant was evaluated for work disability by vocational experts, James Molski on behalf of the claimant and Karen Crist Terrill on behalf of the respondent. Mr. Molski determined that claimant had lost twenty-five to thirty percent (25%-30%) of his ability to perform work in the open labor market. On the other hand, Ms. Terrill found that the claimant had suffered an eighteen percent (18%) loss of his ability to perform work in the open labor market. In regard to the wage loss component of the work disability test, Mr. Molski testified claimant had lost forty-three to forty-nine percent (43%-49%) of his ability to earn a comparable wage, while Ms. Terrill concluded that there were machinist jobs available in the Sedgwick County area that claimant had the ability to perform and earn a comparable wage. Ms. Terrill testified, under cross-examination, that during the four (4) years she was previously employed as a vocational counsellor, she had placed applicants with claimant's restrictions and comparable work experience in machinist jobs at comparable wage. After Ms. Terrill's deposition, claimant obtained the records from one of Ms. Terrill's two previous vocational service company employers. The claimant retained Mr. Molski to review these records and he concluded that Ms. Terrill had not placed a person that had comparable work restrictions and work experience as the claimant in a machinist job while employed by that employer. The claimant then had an employee of Ms. Terrill's other previous vocational service company employer testify that Ms. Terrill was not a placement specialist while she worked for this employer but worked as a vocational rehabilitation specialist who did not make employment placements. The Appeals Board

finds that the claimant has discredited Ms. Terrill's opinion concerning claimant's ability to obtain a job as a machinist at a comparable wage. The Appeals Board concludes Mr. Molski's loss of labor market opinion of twenty-five to thirty percent (25-30%) should be averaged with Ms. Terrill's eighteen percent (18%) loss of labor market, resulting in a twenty-three percent (23%) loss of labor market component of the work disability test. The loss of the comparable wage component of the work disability test is found to be the more credible opinion of Mr. Molski of forty-three to forty-nine percent (43-49%).

Accordingly, the Appeals Board finds that the claimant is entitled to a work disability of thirty-four and one-half percent (34.5%) by giving equal weight to both his loss of ability to perform work in the open labor market and loss of his ability to earn a comparable wage as approved in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated June 7, 1994, should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, John M. Wright, and against the respondent, Montgomery Elevator Company and its insurance carrier, National Union Fire Insurance Company, for an accidental injury which occurred on February 12, 1992, and based on an average weekly wage of $439.20, for 28.43 weeks of temporary total disability compensation at the rate of $289.00 per week in the sum of $8,216.27 and 386.57 weeks of compensation at the rate of $101.02 per week in the sum of $39,051.30 for a 34½% permanent partial general work disability making a total award of $47,267.57.

As of December 29, 1995, there would be due and owing claimant 28.43 weeks in temporary total compensation at the rate of $289 per week or $8216.27, followed by 173.71 weeks of permanent partial compensation at the rate of $101.02 per week in the sum of $17,548.18 making a total due and owing of $25,764.45, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $21,503.12 is to be paid for 212.86 weeks at the rate of $101.02 per week, until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to $350.00 is ordered paid to claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

As stipulated by the parties, the Kansas Workers Compensation Fund is responsible for fifty percent (50%) of all benefits and costs paid in this award.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed 50% against the respondent and 50% against the Workers Compensation Fund to be paid direct as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Barber & Associates	
Transcript of Preliminary Hearing	$182.00
CRS Court Reporting Service	
Deposition of James Molski	$294.20
Deposition Services	
Transcript of Motion Hearing	$ 78.90
Ireland Court Reporting	
Transcript of Proceedings	$ 79.61
Transcript of Regular Hearing	$242.40
Deposition of Karen Terrill	$137.20
Deposition of Paul Stein, M.D.	$121.21
Deposition of Randall Clifford	$184.95
Deposition of Karen Terrill (Cont'd)	$116.45
Deposition of Wayne Brooks, D.C.	$416.70
Deposition of James Molski	$137.40
Deposition of Jeffrey Harding	$138.00

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James P. Johnston, Wichita, Kansas
Edward D. Heath, Jr., Wichita, Kansas
Andrew E. Busch, Wichita, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director